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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

November 6, 2000

Via hand delivery

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D. C. 20554

Re: CC Docket No. 00-176

Dear Ms. Salas:

The attached letter to Cathy Carpino at the Massachusetts Department of Telecommunications and Energy should be made a part of the record in the above-referenced docket.

Very truly yours,

Florence M. Grasso

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Jason D. Oxman
Senior Government Affairs Counsel

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

6 November 2000

VIA EMAIL AND U S MAIL

Cathy Carpino
Massachusetts Department of Telecommunications and Energy
One South Station
Boston MA 02110

Re: CC Docket No. 00-176

Dear Ms. Carpino:

On Friday, November 3, 2000, at approximately 5:30 PM, Covad received, via email, a copy of a letter from you, submitted on behalf of the Department. In that letter, the Department "directs Covad to provide data for its July, 2000, xDSL orders (1-5 lines) to the Department and Verizon by November 6, 2000," i.e. the next business day. In addition, the Department "directs Covad to provide its own data on the number of manual loop qualifications it requested and received from Verizon during July 2000" by the same date.

The specific performance measure that the Department seeks to "reconcile," PR 3-10, measures the percentage of 2-wire xDSL loops that Verizon delivers within six days, which is the interval to which Verizon has committed in Massachusetts. In the first month for which Verizon reported such data, July 2000, Verizon provided loops within the six day interval only 51% of the time. As set out in greater detail below, Covad would welcome further discussion with the Department to assist its analysis in the ongoing viability of PR 3-10, but is unable to assist the Department in the manner and timeframe requested.

Covad is, frankly, confused by the Department's sudden interest in Covad's contentions. As you are aware, the Department has publicly and repeatedly declared its support for Verizon's FCC section 271 application. In addition, the Department has already concluded its review of the legal arguments raised by Covad in opposition to Verizon's application in DTE 99-271. In its comments submitted to the FCC in support of Verizon's application, the Department specifically concluded: "we do not consider Covad's data to demonstrate poor VZ-MA provisioning performance."¹ Indeed, on the

¹ DTE Comments, CC Docket No. 00-176, at 317.

very same day as the Department sent its letter “directing” Covad to provide certain data related to PR 3-10, the Department filed its reply comments with the FCC in support of Verizon’s application. In those comments, the Department repeatedly berated Covad for each of the arguments it raised in opposition to Verizon’s application before the FCC.² The Department’s reply comments suggest that, in this proceeding, the burden was on Covad to prove Verizon’s lack of compliance with the competitive checklist, rather than on Verizon affirmatively to prove its compliance with the checklist.³ Given this atmosphere, Covad is understandably hesitant to assist the Department in “reconciling” Verizon’s data, when the Department has now twice informed the FCC that Covad’s arguments are to be rejected in their entirety.

Setting aside the issue of the Department’s treatment of Covad’s arguments, there is no substantive reason to pursue this “reconciliation.” First, and most importantly, Covad does not challenge the results of PR 3-10 for July 2000 in a manner that requires reconciliation.⁴ Indeed, Covad has argued quite simply that this performance measure, which reflects Verizon’s 51% on-time performance, is conclusive evidence of Verizon’s failure to comply with its xDSL loop checklist obligations. The only issue is Verizon’s “excuse” to explain its poor performance – the issue of whether carriers requested sufficient manual loop qualifications to affect the metric. Verizon claims that data CLECs request manual loop qualification for a certain percentage of their xDSL loop orders, which entitles Verizon to a nine day, rather than a six day, provisioning interval.

2 See, e.g., DTE Reply Comments at 66 (“That Covad, by its own (in)action, chose not to pursue a VZ-MA argument is not a reflection on the Department’s process but, rather, indicates a conscious decision by Covad.”); *Id.* at 68 (“Covad cannot legitimately argue that it was denied an opportunity to investigate VZ-MA’s performance.”); *Id.* at 66 (“Like any other participant, Covad was given a meaningful opportunity to challenge VZ-MA’s assertions or to substantiate Covad’s claims about VZ-MA’s performance by providing its own data.”); *Id.* at 67 (“For a significant number of claims Covad made throughout our proceeding, it was unable to produce any supporting data.”); *Id.* at 66 n. 212 (“Covad did not challenge VZ-MA’s accounting of Covad’s data nor did it ever seek to “reconcile” its claims with VZ-MA’s responses.”) *Id.* at 67. (“We note that, unlike other participants, Covad chose not to propound any discovery on VZ-MA’s May 2000 filing.”); *Id.* at 68 (“Nor should Covad fault the Department for its own inaction during the VZ-MA § 271 investigation.”).

3 For example, the Department in its reply comments faults Covad for failing to bring to the Department’s attention the lack of KPMG testing of DSL metrics. The Department’s response to Covad’s argument that KPMG’s failure to test Verizon’s DSL performance is a serious gap in Verizon’s application was simply that “[t]he FCC should reject Covad’s unwarranted and untimely criticism of KPMG’s testing methodology.” DTE Reply Comments at 28. This in the face of the Massachusetts Attorney General *and* the Department of Justice levying the exact same criticism as Covad against KPMG’s failure to test DSL. See Attorney General Reply Comments at 12 (“Even though the Massachusetts Attorney General alerted the DTE in July and August of this year to the lack of adequate Verizon DSL metrics, the DTE did not require KPMG, the third party tester of Verizon’s OSS, to revise its test deck to include the March 9, 2000, DSL metrics adopted by the New York Public Service Commission. This aspect of KPMG’s final report, therefore, and the DTE’s findings that rests upon it to support Verizon’s DSL services, do not include verified test results and should be disregarded.”); see also DOJ Evaluation at 15 (“Although KPMG reviewed other Verizon performance metrics, it did not test the DSL metrics because they were implemented by Verizon after the initial testing period.”).

4 Thus, whereas data reconciliation may have taken place in other section 271 applications, in those circumstances the BOC and competing carrier had each submitted their own data using a particular method and each submitted their own disparate performance figures. In this case, Covad does not dispute Verizon’s 51% on time performance, and thus no reconciliation is necessary.

Last week, Verizon provided Covad information indicating that Covad requested a manual loop qualification for approximately 20% of the loop orders it submitted. Covad does not seriously dispute that figure – indeed, in a presentation to the FCC before Verizon provided Covad such information, Covad estimated that it requested manual loop qualification for approximately 15% of its loop orders. In sum Covad has submitted nothing in the record before the FCC that is subject to reconciliation. Verizon has made its excuse, and the Department has chosen to accept it without any basis in fact on the record.⁵ That is the Department’s prerogative, but it has nothing to do with Covad or any data that Covad possesses.⁶

Second, the Department has already fulfilled the statutory role that section 271 of the Act grants it in this matter. Having submitted its comments in this proceeding, which the FCC is not required to afford any particular weight, the Department has the same role in this matter as any other commenting party. Because the Department has made its public pronouncements on the validity of Covad’s arguments, Covad cannot countenance prejudicing itself by participating in the Department’s PR 3-10 data reconciliation. Any arguments in opposition to Verizon’s long distance application for Massachusetts are, pursuant to section 271 of the checklist, properly directed to the FCC, the decision-maker in this matter. Should the Department chose to open new hearings into Verizon’s checklist compliance subsequent to the FCC’s rejection of Verizon’s currently pending application, Covad will accept the Department’s invitation to become a participant in that proceeding.

Third, the FCC maintains a “complete when filed” rule with respect to BOC section 271 applications. Specifically, the Commission requires all evidence upon which a BOC relies in support of its application be submitted at the time of that application.⁷ In

5 See DTE Comments at 315 (“If a loop is not pre-qualified through the mechanized database, VZ-MA’s employee will simply tell a prospective customer that it is unable to provide ADSL service. VZ-MA has indicated that it performed over 11,000 manual loop qualifications in Massachusetts for CLECs since the beginning of this year. It is only logical that this added step would increase provisioning intervals for CLECs, thus making it appear that VZ-MA’s performance for CLECs is out of parity, when in fact it is not out of parity.”); *see also id.* at 317 (“Also, VZ-MA has explained persuasively how including loops that are pre-qualified and loops that require manual loop qualification in the measure creates a mis-impression of a lack of parity.”). Thus, although the Department claims to lack adequate information to evaluate Verizon’s “excuse,” it clearly and repeatedly accepts that excuse throughout its comments.

6 In addition, the Department has already used “data reconciliation” as a weapon against Covad to dismiss its arguments concerning loop provisioning in Massachusetts. *See* DTE Comments at 318 (finding Verizon’s on-time performance to be 92% because “the Department oversaw a data reconciliation between VZ-MA and Covad for 132 of Covad’s orders completed between February 7-11, 2000,” and concluding that “we do not consider Covad’s data to demonstrate poor VZ-MA provisioning performance.”). Given that the Department chose to cite this limited reconciliation as grounds for rejecting the substance of all of Covad’s arguments, Covad is reluctant to provide the Department further ammunition to use against it in such an inappropriate manner.

7 “Under our procedural rules governing BOC section 271 applications, we expect that a section 271 application, as originally filed, will include all of the factual evidence on which the applicant would have the Commission rely in making its findings. An applicant may not, at any time during the pendency of its application, supplement its application by submitting new factual evidence that is not directly responsive to arguments raised by parties commenting on its application. This includes the submission, on reply, of factual evidence gathered after the initial filing.” SWBT Texas 271 Order at para. 35.

limited circumstances, the FCC has permitted supplements to the record, but none of those have come after initial comments were due.⁸ As you know, parties filed initial comments weeks ago and reply comments were due last Friday. The Department's efforts to assist Verizon in supplementing the record in this proceeding are, pursuant to the FCC's procedural rules, unwarranted and would be properly ignored by the Commission.

Finally, as the Department of Justice concluded in its Evaluation of Verizon's Massachusetts application, "if Verizon seeks to have its performance evaluated on the basis of measures that differ from the measures adopted by a state commission, Verizon at a minimum should be required to ensure that CLECs and other parties have adequate opportunity and sufficient data to assess and respond to Verizon's claims about the quality of its performance."⁹ The first time Verizon sought to modify PR 3-10 was in an email sent to New York Carrier-to-Carrier collaborative participants on September 11, 2000.¹⁰ The Department is now asking Covad to assist Verizon in eschewing the process by which performance metrics are established, a process in which Covad has willingly participated, in favor of an informal meeting to adjust the definition of PR 3-10 (posed as a "data reconciliation") that will assist Verizon in its effort to excuse itself from its poor performance in Massachusetts. Covad respectfully declines the invitation.¹¹

Covad is, however, willing to work with the Department in a more constructive manner. If, indeed, PR 3-10 is an unreliable metric because of the inclusion of manually-qualified loop orders, there are numerous parties in Massachusetts (and New York, for that matter) that have an interest in and should have a say regarding the creation of a revised PR 3-10 metric. Covad would welcome the opportunity to assist the Department in examining other aspects of Verizon's treatment of DSL providers in Massachusetts as well. In particular, Covad recognizes and appreciates that the Department sought out Covad for its input in the matter of potential modifications to PR 3-10, and Covad would welcome the opportunity to assist the Department in that effort, should it prove necessary. In sum, Covad does not dispute the July 2000 results of PR 3-10 that Verizon has submitted to the FCC, and thus does not have anything to contribute to the Department's suggested data reconciliation. In order to address any need to modify PR 3-10, or to discuss other issues, the Department should contact the undersigned to set up a mutually convenient time to discuss this matter further.

8 "The new evidence, however, must cover only the period placed in dispute by commenters and may, in no event, post-date the filing of the comments (i.e., day 20)." *Id.*

9 DOJ Evaluation at 14.

10 See Attachment E to Covad's Reply Comments in CC Docket No. 00-176.

11 Covad also notes that neither the undersigned attorney, who is responsible for prosecuting this matter before the FCC, nor the other two Covad attorneys to whom the Department's letter was addressed, are available to attend the Department's suggested session in Boston on Wednesday, November 8, 2000. Because of the NARUC meeting scheduled to run until November 14 in San Diego, Covad will not be available to meet with the Department until at least the end of next week.

Sincerely yours,



Jason D. Oxman

Senior Government Affairs Counsel
Covad Communications Company

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